

FALLING BETWEEN THE CRACKS: THE SPECIAL TRIBUNAL FOR
LEBANON'S JURISDICTIONAL GAPS AS OBSTACLES TO ACHIEVING
JUSTICE AND PUBLIC LEGITIMACY

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ABSTRACT

The advent of the Special Tribunal for Lebanon has been the first serious effort for accountability and ending impunity for political assassinations in Lebanon's modern history. Nevertheless, the past experiences of United Nations International Independent Investigation Commission and recently the STL have revealed challenges and lacunae in their investigative process. This includes, inter alia, a complex and ambiguous relationship between the UNIIIC's activities and the STL, the failure of the STL in preventing repeated leaks of confidential documents and witnesses interviews, and weak public outreach over false testimonies before the UNIIIC. This article argues that while the STL's role remains crucial for ending impunity for the first time in such a torn society, the STL as an international (ad hoc) tribunal is not well equipped to deal with these unpredicted variables in law and policy. The STL Statute is silent on these complex variables and the recent amendments of the Rules of Procedure and Evidence failed to tackle these lacunae as they apply prospectively and not retroactivity. The nascent jurisprudence of the STL has not been able to overcome these shortages and lacunae. To overcome these hurdles and to regain trust in the STL, this article calls upon the STL to take a series of administrative and legislative measures of which the public should be informed and not alienated, as justice is not only about the provision of justice, but also about the perception of providing it. The article concludes by urging the STL to correct the existing errors hand in hand with continuously trying to achieve justice and accountability for all offences and misconducts, including its own.

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INTRODUCTION

No judicial process has ever attracted the amount of political tension and divergence in Lebanon as has the international investigation of the assassination of former Prime Minister Rafiq Hariri. For a country not well known for its history of truth seeking and ending impunity, this judicial process continues to be received with mixed feelings of suspicions and concerns by opponents, and hope and aspiration among supporters. In Lebanon, this rift on the pursuit of justice in general, and on an internationalised one in particular, has not been based on concerns over the substantive process. Rather the focus has been mainly on the political implications of such a process on the two confronting coalitions: the March 8 coalition and the March 14 coalition.¹ The March 14 coalition has been a strong supporter of the process, hoping that it will identify the perpetrators as its political opponents, possibly Hezbollah and, indirectly, Iran and Syria. The March 8 coalition took every opportunity to discredit and delegitimize the process domestically and, if possible, internationally. It has attempted to do so by questioning the evidences collected, focusing on alleged false testimonies and leaks to the media of interviews with witnesses and victims.² Two primary institutions have been responsible for the process of investigating the assassination of former Prime Minister Hariri: the United

¹ See Jan Erik Wetzel and Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 THE LAW AND PRAC. OF INT’L CTS. AND TRIBUNALS 81 (2008).

² See articles of Lebanese Newspaper Al-Akhbar, www.al-akhbar.com.

Nations International Independent Investigation Commission (“UNIIC”) and the Special Tribunal for Lebanon (“STL”). UN Security Council Resolution 1595 entrusted the UNIIC “to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices”³ The mandate of the UNIIC lasted from April 2005 until March 2009, when it was in practice transformed to the Office of the Prosecutor at the STL. The STL entered into force by a decision of the UN Secretary General pursuant to UN Security Council Resolution 1757 (“Statute”), which put into force the unsigned draft agreement between Lebanon and the United Nations. Resolution 1757 entrusts the STL to prosecute “persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons”.⁴ It has primacy over Lebanese judiciary regarding its jurisdiction.⁵

At the early days of the Statute one author described the birth of the STL as a cripple.⁶ After two years of entry into force, the STL’s experience has reflected positive achievements as well as alarming shortages and gaps in law and policy. The functioning of the STL, and its predecessor the UNIIC, has already been more challenging when compared to other international courts. This is particularly true regarding their operations in very unstable and tumultuous political and security conditions. Further complexity emerged from the continuation of investigation under different mandates from the UN Fact Finding Mission, the UNIIC, and the STL. Political complexities continue to challenge the STL as a legal entity and it is - similar to many other ad hoc tribunals - not well equipped to respond efficiently to these complexities. While the STL’s contributions to ending impunity and accountability within the Lebanese and international context is self evident, the short experience of the UNIIC and the STL in the past years revealed shortages and challenges in law and policy. This includes, *inter alia*, a complex and ambiguous relationship between the UNIIC’s legal activities and the STL, weak knowledge within the STL of the domestic political dynamics, and weak outreach to the public over false testimonies before the UNIIC. The latter issue badly damaged the public perception over the international investigation and *mutatis mutandi* the STL

³ S.C. Res. 1595, 1, U.N. Doc. S/RES/1595 (Apr. 7, 2005) [hereinafter S.C. Res. 1595].

⁴ S.C. Res. 1757, art. 1, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter S.C. Res. 1757], available at <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statue-EN.pdf> (last visited July 10, 2011).

⁵ *Id.* at art. 4.

⁶ James Cockayne, *The Special Tribunal For Lebanon – A Cripple From Birth? Foreword*, 5 *J. of Int’L Crim. Just.* 1061 (2007).

process. Lastly, the failure of the tribunal in preventing successive leaks of interviews, recordings, and information of investigations and indictments scarred the image of the tribunal as an impartial body doing justice.

This article argues that while the STL's role remains crucial for ending impunity for the first time in Lebanese society, the STL as an ad hoc tribunal is not well equipped to deal with some unanticipated challenges in law and policy. The article will first highlight some of the main features that the STL enjoys compared to other international courts. The article does not intend to conduct a comparative study, but rather to show the unique features that require distinct solutions rather than copying and pasting ones from other international courts. The article then will proceed to shed light on the deficiencies the STL has been facing in structure and *modus operandi*. These include contentious issues revealed within the Statute, the STL's Rules of Procedure and Evidence ("RPE")⁷, and the STL's jurisprudence in relation to the UNIIC and its functions. The article will then discuss the problem of prosecuting leaks of confidential UNIIC interviews and investigations. It will also shed light on the STL's (re)action to these aspects and its interaction with the affected community. It concludes by recommending a series of administrative and legislative measures for the STL to overcome the hurdles and regain the trust and support of the local public.

I. INNOVATIONS AND DISTINCT FEATURES OF THE STL

Previous academic work has already elaborated on the various differences and innovations that the STL enjoys compared to other ad hoc and mixed tribunals.⁸ However, it remains pertinent to reiterate these important points and their contribution to an international justice system for prosecuting terrorism, a new crime on the international level.

The first innovation is the subject matter jurisdiction itself. This is the first international tribunal to prosecute the crime of terrorism, albeit solely on a domestic definition.⁹ However, the jurisprudence of the STL based on this definition opens the door for the crystallization of an international definition of the terrorism in international law. The recent Appeal Chamber's *Decision on the Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*

⁷ For an explanation and overview of the RPE, see http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/20101125_Explanatory_memorandum_EN.pdf.

⁸ Cecile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 *J. of Int'l Crim. Just.* 1107,(2007).

⁹ Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 *J. of Int'l Crim. Just.* 1125 (2007).

confirms this proposition.¹⁰ This landmark decision will likely serve as a cornerstone decision in setting the legal constituencies of the crime of terrorism in international law.

Second, the STL is the first international tribunal that allocates an independent Defence Office outside the Registry. Its mandate, according to Article 13 of the Statute, is to protect the rights of the defence, provide legal and administrative support to the defence, and establish a list of defence counsel that may appear before the STL.¹¹ This is an important step forward when compared to some international courts that recognised a defence office within the registry. This innovation within the Statute is a significant development in international criminal law and human rights standards for ensuring a fair trial and equality of arms. According to the President of the Tribunal, it is the first time an international tribunal establishes a defence office as an independent organ on a par with the Office of the Prosecutor.¹²

A third innovation is providing for the victims' participation in the proceedings by allowing them to present their views and concerns under Article 17 of the Statute. This comes as the outcome of a process that has been evolving within the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). At the ECCC, victims can participate as "*parties civiles*" to support the prosecution and for reparation demands. By contrast, the victims' intervention before the STL is not as private claimants.¹³

Additional distinctive features of the STL include more civil law traits in its functions such as: a pro-active role of Judges in the proceedings, admissibility of written evidence, alternative measures to detention, protection of sensitive information, and, more importantly, trials *in absentia*. The latter is of paramount importance considering the hostility of the new ruling majority in Lebanon towards the STL. Taken Hezbollah's latest refusal to surrender any of its members,¹⁴ the remaining scenario seems to be

¹⁰ Case No. STL-11-01/I, *Interlocutory Decision on the Applicable Law, Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Appeal Chamber, Special Tribunal for Lebanon (Feb. 16, 2011), available at http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_Decision_Filed_EN.pdf (last visited Jan. 23, 2011).

¹¹ S.C. Res. 1757, *supra* note 4, at art. 1.

¹² PRESIDENT ANTONIO CASSESE, ANNUAL REPORT, SPECIAL TRIBUNAL FOR LEBANON 2009-2010 (Mar. 2010), available at http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf (last visited Feb. 25, 2011).

¹³ *Id.* at 18.

¹⁴ Bassem Mroue, *Hezbollah leader vows not to surrender members*, THE NEWS TRIBUNE, July 2, 2011, <http://www.thenewstribune.com/2011/07/02/1730086/hezbollah->

a trial in absentia for Hezbollah members before the STL. The new Hezbollah led ruling majority does not seem to tolerate the presence or the work of the STL. This hostility has become vocal, especially in the wake of leaks that the STL would indict Hezbollah figures for their involvement in the Hariri assassination. The recent indictment by the STL of four Hezbollah members has confirmed such leaks.¹⁵ The recent harassment of international investigators when examining records in a gynaecologist clinic in the strong hold of Hezbollah in the south suburb of Beirut¹⁶ is likely only the beginning of active hostility towards the STL.

Another important contribution of the STL will be the legacy it leaves for the coming generations in Lebanon and the Middle East. It is the first serious attempt to end impunity in Lebanon's modern history.¹⁷ Since 1976 Lebanon has suffered from a series of political assassinations of leaders, politicians, and public figures in a climate of complete impunity.¹⁸ Whether due to the collapse of the state or intimidation, the Lebanese judiciary remained impotent to name the perpetrators and punish them. The few times when the Lebanese courts adjudicated these crimes, it seemed that the prosecutions were politically motivated by the puppet regime that was ruling

leader-defends-hariri.html (last visited July 11, 2011).

¹⁵ See Erich Follath, *Breakthrough in Tribunal Investigation, New Evidence Points to Hezbollah in Hariri Murder*, DER SPIEGEL, May 23, 2009, available at <http://www.spiegel.de/international/world/0,1518,626412,00.html> (last visited Mar. 27, 2011); Neil Macdonald, *Investigation: Who killed Lebanon's Rafik Hariri?*, CBC NEWS, Nov. 21, 2010, <http://www.cbc.ca/news/world/story/2010/11/19/f-rfa-macdonald-lebanon-hariri.html> (last visited Mar. 20, 2011); Case No. STL-11-01/I, Decision Relating To The Examination Of The Indictment Of 10 June 2011 Issued Against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi & Mr. Assad Has San Sabra, Pre-Trial Judge, Special Tribunal for Lebanon (June 28, 2011), available at http://www.stltsl.org/x/file/TheRegistry/Library/CaseFiles/PreTrialChamber/20110816_F0012_PUBLIC_PRV_PTJ_Confirmation_Decision_Filed_FR-EN.pdf (last visited Aug. 20, 2011).

¹⁶ *UN Investigators Attacked at Dahiyeh Clinic Discuss Scuffle 'At Length' at Physicians Order HQ*, LEBANON NEWS, Nov. 5, 2010, <http://www.lebanonnews.net/mainra.asp?raid=6735> (last visited Mar. 17, 2011).

¹⁷ After conflicts and crises, the Lebanese legislature and policy makers were to issue amnesty laws for the (international and ordinary) crimes committed during these periods. See Amnesty Law of October 19, 1949; Amnesty Law of Some Crimes of February 23, 1954; Amnesty Law of December 24, 1958; Amnesty Law 8/69 of February 17, 1969; Amnesty Law for Crimes Committed Before March 28, 1991; No. 84 of August 26, 1991; Amnesty Law No. 666 of December 29, 1997; Amnesty Law for Some Crimes, No. 677 of July 19, 2005; Amnesty Law for the Dinneyeh and Majdel Anjar incidents, No. 678 of July 19, 2005.

¹⁸ The list of assassinations included prominent political and public figures such as the head of the Progressive Socialist Party Kamal Junblatt, the Lebanese elected president Bachir Gemayel, the Sunni Mufti Hassan Khaled and others.

Lebanon in the nineties of the last century.¹⁹

The most significant feature of the STL, at least for the purposes of this article, is the succession of its Office of the Prosecutor (“OTP”) from the UNIIIC. Unlike other ad hoc tribunals, the STL did not start from scratch but was preceded by a UN investigation commission that itself replaced the UN Fact Finding Mission of Peter Fitzgerald.²⁰ This characteristic distinguishes the STL from other international tribunals in that “the investigative process conducted by the International Independent Investigation Commission constitutes, in fact, the core nascent prosecutor’s office.”²¹ The prior existence of internationally mandated investigation commissions and fact finding commissions is not completely original. This was experienced with the UN Commission to Investigate War Crimes in the Former Yugoslavia,²² and to a lesser extent in Rwanda with the Special Rapporteur on the Situation of Human Rights in Rwanda.²³ However, neither the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) nor that of the International Criminal Tribunal for Rwanda (ICTR) had specific articles organizing the relationship with these bodies. The STL is the only international tribunal that has a statutory organization of the transition from the UNIIIC to the STL. Article 19 of the Statute stipulates:

Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection

¹⁹ According to some, the cases against Samir Gaagea, a Christian leader who remained vocal against Syrian presence in Lebanon, were politically motivated by vengeance rather than truth and justice.

²⁰ PETER FITZGERALD, REPORT OF THE FACT-FINDING MISSION TO LEBANON INQUIRING INTO THE CAUSES, CIRCUMSTANCES AND CONSEQUENCES OF THE ASSASSINATION OF FORMER PRIME MINISTER RAFIK HARIRI, Mar. 24, 2005, <http://www.stl-tsl.org/sid/49#UNFactFindingMission> (visited February 13, 2011)

²¹ UNITED NATIONS SECURITY COUNCIL, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, 8, U.N. Doc. S/2006/893 (Nov. 15, 2006), available at <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/SGReports/2006-11-15%20SG%20Report-893-EN.pdf> (last visited Feb. 22, 2011).

²² United Nations Security Council, *The Commission to Investigate War Crimes in the Former Yugoslavia*, S.C. Res. 780 (1992).

²³ Appointment of the Special Rapporteur of the Commission on Human Rights in Rwanda, S.C. Res. S-3/1 (May 25, 1994).

of evidence. The weight to be given to any such evidence shall be determined by the Chambers.²⁴

According to one author, “the STL jurisdiction echoes the mandate of UNIIC”,²⁵ and thus the nature of the relationship with the UNIIC remains unclear, although technically the UNIIC ceased to exist. “In light of [the] relatively limited powers of the international prosecutor, and of the narrow jurisdiction of the STL, the relationship between the Special Tribunal and other entities responsible for investigating or prosecuting the attacks falling within its mandate will indeed be critical.”²⁶

The Commissioner of the UNIIC (“Commissioner”) and those who were following on the transition from the UNIIC to the STL were aware of some of the challenges. However, it seems that they could not take into account all of the perplexing variables that have showed up subsequently. The Commissioner in his Fourth Report to the Security Council delineated the importance of having a coordinated transition between the work of the UNIIC and the STL.²⁷ He further stressed the need to ensure that the work of the Commission is preserved and that evidence it collected prior to the establishment of the STL is admissible by the tribunal.²⁸ “The internal procedure will therefore help ensure that any information collected or obtained by the Commission is admissible in future legal proceedings, notably before a tribunal of an international character”.²⁹ The reports of the Secretary General pursuant to Security Council Resolution 1757 have all stressed the importance of steps that ensure efficient and easy transition from the UNIIC to the STL.³⁰ Those who were in charge of setting the foundations of the STL were aware of the complexities and the *sui generis* nature of the relationship between a commission having an investigative mandate under Chapter VII and an international tribunal that has an investigative, prosecutorial, and adjudicative role over the same subject

²⁴ S.C. Res. 1757, *supra* note 4.

²⁵ Cecile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 *J. of Int’l Crim. Just.* 1107, 1112 (2007).

²⁶ *Id.*

²⁷ UNITED NATIONS GENERAL ASSEMBLY, *Fourth Report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005)*, U.N. Doc S/2006/375 (June 10, 2006) (prepared by Serge Brammertz).

²⁸ *Id.*

²⁹ *Id.* at 111.

³⁰ UNITED NATIONS SECURITY COUNCIL, *Report of the Secretary-General submitted pursuant to Security Council Resolution 1757 (2007) of 30 May 2007*, U.N. Doc S/2007/525 (Sept. 4, 2007); UNITED NATIONS SECURITY COUNCIL, *Second report of the Secretary-General submitted pursuant to Security Council Resolution 1757 (2007)*, U.N. Doc. S/2008/173 (Mar. 12, 2008).

matter. Therefore, the reports of the UN Secretary General and the UNIIC disclosed the deliberate attention given to the transition of the files, investigations, personnel, data, and all related material from the UNIIC to the OTP. The Fourth Report of the Secretary-General pursuant to Security Council Resolution 1757 indicates that:

The Registrar and the Commissioner have developed a plan for the transition from the Investigation Commission to the Office of the Prosecutor, from 1 January to 28 February 2009. The plan is intended to phase in staff gradually in order both to minimize disruption to the investigation work and to provide the Registry with adequate time to absorb a large number of staff as efficiently as possible.³¹

On a parallel level, Article 4(2) of the Statute organizes the transfer of the jurisdiction from the Lebanese courts to the STL,³² and that includes the *dossier* and those arrested regarding crimes that are under the jurisdiction of the STL. Article 4(2) reads:

Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.³³

The drafters of the Statute expected its articles to ensure that justice can be done and seen to be done impartially and efficiently. The importance of such tribunals is not only in providing accountability for the perpetrators. As institutions they also create a perception and legacy of promoting justice and rule of law to allow torn societies to overcome their difficult past. However, the experiences of the STL in the last two years have unveiled complex situations that probably were not envisaged by the drafters of the Statute and its RPE. These distinctive features of the STL require more customization of the Statute and its RPE rather than copying and pasting a one model that fits all approach from other international courts.

³¹ UNITED NATIONS SECURITY COUNCIL, *Fourth Report of the Secretary-General submitted pursuant to Security Council Resolution 1757 (2007)*, 18, U.N. Doc. S/2009/106 (Feb. 24, 2009).

³² S.C. Res. 1757, *supra* note 4, at art. 4(2).

³³ *Id.*

II. CHALLENGES AND SHORTAGES IN THE STL'S STRUCTURE AND MODUS OPERANDI

The procedural and substantive process of the STL - as an ad hoc international tribunal³⁴ - provides another model of innovation, but also reveals shortages in envisaging various legal and practical complexities that evolved after the drafting of the Statute and the first version of the RPE. As mentioned *supra* this includes, among others; unresolved complexities in relation of the UNIIC, Lebanese courts, and the STL; the lacunae of prosecuting crimes of false testimonies, contempt and obstruction of justice committed before the UNIIC; and apparent failures to appreciate Lebanese socio-political dynamics.

A. *Unresolved Complexities in the Relationship of the UNIIC to the Lebanese Courts and the STL*

The experiences of the STL have showed inconsistencies between the Lebanese law and the STL. Although the STL has precedence over the Lebanese judicial system, this primacy should allow Lebanese courts to act as complementary machinery to the STL. In order to provide justice for “related offenses,” the Lebanese judicial system should be able to adjudicate issues that fall under the inherent subject matter jurisdiction of the court, but ambiguously outside the temporal jurisdiction of the STL. This is the exact situation with the notorious false testimony scandal before the UNIIC and the Lebanese law. The Lebanese law exercises jurisdiction over false testimonies,³⁵ however, this usually takes place with an existing dossier or a core case that is being looked into by the judiciary. The deferral of the core case of former Prime Minister Hariri to the STL created a bizarre situation in that the *dossier* and jurisdiction over the core case have been transferred to the STL, leaving the Lebanese courts with no jurisdiction over the core case.

The Statute, which organizes the relationship of the STL with the UNIIC under Article 19, also did not elaborate as to how to deal with such “related offenses”. The legal situation for individuals who provide intentionally false information before the Commission remains unclear. Are they false witnesses? Does that raise legal accountability for those who provide false statements? Furthermore, what is the responsibility of the

³⁴ Although originally the STL was envisaged to be a treaty based Tribunal through an agreement between Lebanon and the United Nations, the failure of Lebanese parliament to ratify the agreement led the Security Council to establish the STL under Chapter VII. The present writer is of the stand that the legal nature of the STL is a Chapter VII ad hoc tribunal regardless of its mixed nature.

³⁵ Lebanese Penal Code, Legislative Decree No. 340/NI of Mar. 1, 1943, art. 408 [hereinafter Lebanese Penal Code].

Commission's staff regarding preserving the confidentiality of the investigation?

These overlooked questions by the drafters of Security Council Resolutions 1595 and 1757 left the international (para)judicial process to suffer from shortages and lacunae that damaged the credibility of the international investigations among the public.³⁶ One of these shortages has been the cases of false witnesses and testimonies before the UNIIC. The Prosecutor himself indicated that the Commission was exposed to witnesses of questionable credibility. These testimonies probably reach the level of contempt and obstruction of the administration of justice. Some of these alleged witnesses were intelligence agents who penetrated the process to have access to information on other witnesses and persons.³⁷ There have been assassinations of individuals and political figures immediately after giving their testimonies before the UNIIC, even though this testimony was supposed to be confidential.³⁸ There have been rumours that some of these individuals were identified by at least one infiltrating "witness" and that caused their death.³⁹ An important issue is the type of liability for such acts before the UNIIC. The lack of a clear answer indicates a lacuna in the mandate of the UNIIC. This issue also applies to the STL because the STL depends on the evidence collected by the UNIIC. The international standards of the UNIIC filter out falsified evidence and collected data. However, it is bizarre that while such information is discarded, the *mala fide* provider remains immune from liability.

The Statute has not filled this serious gap in the UNIIC's mandate, as the former restricted prosecution to contempt of the court or false testimony before the STL only. Most of the languages of Rules 60 *bis* and 152 of the RPE have been copied from other ad hoc tribunals. However, the STL varies from the other tribunals in having a predecessor investigating commission. The statutory dichotomy between the STL and the UNIIC is understandable, but has been damaging as it fails to provide justice or at least create the perception of providing it. The argument of non-retroactivity regarding the STL prosecution of crimes before the UNIIC is weak considering that the STL is already prosecuting a crime that occurred before

³⁶ Gary C. Gambill, *The Hariri Investigation and the Politics of Perception*, GLOBAL POLITICIAN, Aug. 27, 2008, available at <http://www.globalpolitician.com/25158-hariri> (last visited Mar. 10, 2011).

³⁷ Qifa Nabki, The Return of Hussam Hussam, Jan. 31, 2011, available at <http://qifanabki.com/2011/01/31/haqiqa-leaks-hussam-hariri/> (last visited Mar. 20, 2011).

³⁸ Examples include MP Jibrán Toueiny and the former Secretary General of the Lebanese Communist Party George Hawi.

³⁹ This rumour was repeated for George Hawi who was identified by one witness, but that remained without concrete evidence.

its establishment, and the crimes against the administration of justice are already crimes under Lebanese law.⁴⁰ The STL Appeal Chamber already accepted the Case of Jamil Essayed concerning whether it has an inherent jurisdiction regarding “related offenses” to its primary jurisdiction.⁴¹ However, this case does not concern jurisdiction over misconduct before the UNIIC, as the RPE prevents the exercise of over issues originating prior to 2009. This will be elaborated *infra* when covering the STL’s jurisprudence over the issue.

1. The UNIIC and Lebanese Courts

Security Council Resolution 1595 established the Commission with the following main functions: to assist the Lebanese authorities in their *investigation* of the Hariri terrorist attack and other subsequent attacks; to help identify the perpetrators, sponsors, organizers, and accomplices; to have full access to all official Lebanese documentary, testimonial and physical information and evidence; to interview officials and all other persons in Lebanon of relevant to the Commission; and to access all sites and facilities that the Commission deems relevant to the inquiry.⁴² Clearly the activities of the UNIIC were not meant to conflict with those of the Lebanese courts. On the contrary, Resolution 1595 established the UNIIC to provide assistance in investigations and technical support to these efforts.

On the Lebanese level, the domestic courts’ jurisdiction over the Hariri terrorist crime continued from 2005 until the deferral of jurisdiction to the STL on March 27, 2009. After that date, courts took the position that the Lebanese courts had no jurisdiction *ratione materiae* over the crime of assassination of former Prime Minister Hariri as it had come within the exclusive jurisdiction of the STL. The first Investigative Judge Ghassan Munif Owaيدات in Beirut indicated:

Given that the purpose of this action is to address the false investigations which took place following the assassination of former Prime Minister Rafik Hariri and that this action currently falls under the jurisdiction of the Special Tribunal of Lebanon following the declaration that the Lebanese courts are without

⁴⁰ Lebanese Penal Code, *supra* note 35, at art. 408.

⁴¹ In the Matter of El Sayed, Case. No. CH/AC/2010/02, *Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing*, Appeal Chamber, Special Tribunal for Lebanon (Nov. 10, 2010) [hereinafter *Jurisdiction and Standing Appeal Decision*], available at <http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/main-interlocutory-appeal-01/filings/orders-and-decisions/appeals-chamber/decision-on-appeal-of-pre-trial-judges-order-regarding-jurisdiction-and-standing> (last visited Aug. 21, 2011)

⁴² S.C. Res. 1595, *supra* note 3, at 1-3.

jurisdiction in this matter from 1-3-2009 in application of the agreement established between the United Nations and the Lebanese Republic dated 6-2-2007. It follows that the absence of jurisdiction of the Lebanese courts to entertain this action and its amendments should then be declared. [Translation]⁴³

Interestingly, Judge Owaidat found that Lebanese courts had no jurisdiction over a case of false testimony in relation to the Hariri investigation that took place during the mandate of the UNIIIC before the entry into force of the STL.⁴⁴ This testimony occurred before the UNIIIC, and probably before national courts as well, prior to March 2009. While the reasoning for the decision can be criticized, such criticism is probably the result of confusion and perplexity on the domestic level regarding the UNIIIC's mandate [and then the STL's] on the subject matter and the *rationae temporis* jurisdiction vis-à-vis the mandate of Lebanese courts.

However, the Minister of Justice took a contrasting stand by indicating that Lebanese courts do have jurisdiction even for testimonies that were only given before the UNIIIC. In his important report submitted to the Lebanese Council of Ministers on October 11, 2010,⁴⁵ the Minister of Justice delineated a number of significant points on the issue of false witnesses or those described by the STL Prosecutor as “à crédibilité douteuse”⁴⁶ Firstly, he indicated that the Lebanese courts had jurisdiction over the Hariri case and related ancillary offences from February 2005 till the deferral to the STL in March 2009. In other words, the Lebanese judicial system had jurisdiction during the mandate of the UNIIIC. Therefore, it seems he stood by the explicit language of Security Council Resolution 1595 in which the UNIIIC is “to assist the Lebanese authorities in their investigation of all aspects of this terrorist act.”⁴⁷ Secondly, the Minister of Justice enlisted the names of possible false witnesses indicating that a number of them were only interviewed by the UNIIIC and never by Lebanese authorities.⁴⁸ While referring to Article 408 of Lebanese Penal Code (LPC), he surprisingly indicated that the Lebanese courts have jurisdiction over the cases of false

⁴³ Case No. 11724/2008, Decision of January 27, 2010 by Lebanese Judge Ghassan Munif Owaidat.

⁴⁴ *Id.*

⁴⁵ Ibrahim Najjar, *The Report of Minister of Justice Ibrahim Najjar to the Lebanese Council of Ministers* [Arabic], Oct. 1, 2010, <http://www.saidaonline.com/news.php?go=fullnews&newsid=37149> (last visited Mar. 27, 2011).

⁴⁶ *Id.* Citing the STL Prosecutor's description of these witnesses as ones with questioned credibility.

⁴⁷ S.C. Res. 1595, *supra* note 3.

⁴⁸ Najjar, *supra* note 45.

witnesses before the UNIIC even if Lebanese judicial or administrative authorities never interviewed them.⁴⁹ He supported his stand by analogizing that if the UNIIC is assisting Lebanese authorities and its investigations were included in the Lebanese file before being deferred to the STL, then, according to Minister Najjar, interviews before the UNIIC can be considered as if they have been conducted before the Lebanese judicial authorities.

This latter interpretation is erroneous as it is inconsistent with the explicit language of Article 408 of the LPC. The language of this Article proscribes the intentional providence of false information before the Lebanese judicial or administrative authorities, but does not expand to cover interviews conducted by different *forums*.⁵⁰ Article 408 provides punishment of three months to three years of imprisonment for an individual who testifies with a false statement or denies a fact before a judicial, military judicial or administrative authority.⁵¹ The Article clearly defines the authorities before which such an offence can take place; a civil or a military judicial authority or an administrative authority during an interrogation. Although the term “Lebanese” is not mentioned, this Article is part of domestic law, and that is the Lebanese authorities exclusively.

Furthermore, Article 408 is a criminal article that proscribes a criminal behaviour, and therefore it should be interpreted restrictively and not expansively. Such an expansive interpretation violates the principle *nullum crimen sine lege*. It goes without saying that analogy is prohibited for creating new crimes in Lebanese and international law. Additionally, one may argue that the *actus reus* of the crime of false testimony under Article 408 requires its occurrence before Lebanese judicial or administrative authorities. One prominent Lebanese jurist indicated that Article 408 cannot but be interpreted restrictively to the degree that any testimony before the Lebanese police will not fall under Article 408 unless the police were acting under the instruction of a [Lebanese] judicial authority.⁵²

Therefore, although the clear intention of Minister Najjar is to avoid the lacunae in the law regarding this *sui generis* situation, his interpretation of Article 408 is erroneous on this point. This is due both to its contradiction with the language of Article 408 and to its violation to the principle of legality stipulated in Article 1 of the LPC and established as a principle of

⁴⁹ *Id.*

⁵⁰ Lebanese Penal Code, *supra* note 35, at art. 408. See the language of Article 408 of the Lebanese Penal Code, which exclusively mentions a judicial body, whether civil, or martial or administrative.

⁵¹ *Id.*

⁵² Minister Boutous Harb, *A Study on False Witnesses*, ELNASHRA, [Arabic] <http://www.elnashra.com/articles-1-23468.html> (last visited Mar. 26, 2011).

human rights and international criminal law. Furthermore, one can ask about the legal effect of Minister Najjar's position on the Lebanese judiciary. While the Minister of Justice in Lebanon does enjoy certain powers vis-à-vis the judiciary, he remains part of the executive power. In addition, since October 2010 and until the writing of this article, no domestic judiciary has taken any action on this file, and it seems that the position of Investigative Judge Owaidat remains standing. In other words, the judiciary has not translated the opinion of Minister Najjar into investigations or prosecutions of such cases.

This debate brings the argument to its core: what is the legal nature and implications of the UNIIC's activities in Lebanese law and international law? One can describe this issue as at best confusing and obscure. As shown above, the UNIIC was entrusted with an investigative mandate under Resolution 1595 to assist the Lebanese authority in their investigations over the assassination of Hariri. Along these lines, the UNIIC under Resolution 1595 enjoyed the full cooperation of Lebanese authorities to access information and interview individuals for this purpose. The UNIIC did not enjoy any prosecutorial powers. It is an organ established under Security Council's powers for supporting a national system to end impunity for a serious terrorist crime, but is not an autonomous judicial entity. This innovative *sui generis* mandate for such a Commission⁵³ brought up questions over situations on which Resolution 1595 remained silent.

2. The UNIIC's Activities and STL Jurisdiction Statute and RPE

a. *Statute and RPE*

Similar to the ICTY and ICTR, the Statute is silent on the offence of contempt and obstruction of justice. It has been left to the judges to deal with this issue in the RPE. This is not without complications as it is unusual for the RPE to create offenses. This raises questions on *nullum crimen sine lege* regarding prosecuting the offence of contempt of the court.⁵⁴ Jurisprudence in international criminal law has evolved to allow judges to adopt rules beyond the "inherent jurisdiction" of their tribunal.⁵⁵ However, this is

⁵³ There have been a number of fact finding missions that were established by the Security Council, but this was the first time a commission was established with an investigative mandate that was then formally correlated to an international court, namely the STL.

⁵⁴ Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice, an Unforeseen Problem Concerning Sentencing and Penalties*. 5 *J. of Int'l Crim Just.* 735, 737 (2007).

⁵⁵ Prosecutor v. Tadic, Case No. IT-94-1-A-R77, *Judgment on Allegations of Contempt Against Prior Counsel Milan Vujin* (Jan. 31, 2000) ('Vujin Judgement'); Prosecutor v. Limaj,

problematic in civil law systems, including Lebanon, as courts strictly adhere to the principle *nullum crimen sine lege*.⁵⁶ The need to criminalize contempt of international courts seems motivated by necessity rather than legality. The STL is no different. However, the criticism of the STL is that instead of adopting offences against the administration of justice in the Statute - such as the ICC model - the drafters adopted the ad hoc tribunals' model of leaving it to the judges to proscribe it within the RPE.

It is regrettable that the STL adopted the ad hoc tribunal common law model for offences against the administration of justice while it had the option of including them in its Statute, similar to Articles 70 and 71 of the ICC Statute.⁵⁷ Although the STL is not part of the Lebanese system, adopting the latter model would have been more in conformity with the subject matter jurisdiction of the Tribunal that itself rests on the Lebanese civil law system. Aside from the legality dilemma, the legal public opinion in Lebanon remains uncomfortable with the STL for prosecuting the crime of terrorism under the LPC while it is prosecuting the other subsidiary related offences using different modalities that are continuously amended by the judges.⁵⁸

In his Explanatory Memorandum over the Rules of Procedures and Evidence of June 10, 2009, the President of the STL indicated that:

The Rules of Procedure and Evidence (RPE or Rules) must be based on and consistent with the Statute of the Tribunal. Article 28(2) of the Statute mandates the Judges to adopt the RPE and, in doing so, to be guided by the Lebanese Code of Criminal Procedure (LCCP) and other "reference materials" reflecting the highest standards of international criminal procedure.⁵⁹

One may ask another question on the sources of law for the RPE: if it is the Lebanese procedural law, then is adopting and amending the RPE by the judges themselves tolerable under Lebanese law? It is an established

Case. No. IT-03-66-T-R77, *Judgment on Contempt Allegations, Beqa Beqaj* (May 27, 2005) ('*Beqa Beqaj* Judgment'); Prosecutor v. Jovic, Case No. IT-95-14/2-R77, *Trial Judgment* (Aug. 30, 2006) ('*Jovie* Judgment').

⁵⁶ Lebanese Penal Code, *supra* note 35, at art. 1.

⁵⁷ Rome Statute of the International Criminal Court U.N. Doc. A/CONF 183/9, arts. 70, 71 (July 17, 1998) [hereinafter Rome Statute].

⁵⁸ See the successive amendments of the Rules of Procedure and Evidence, <http://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence> (last visited on Aug. 15, 2011).

⁵⁹ Rules of Procedure and Evidence as of 10 June 2009, The Special Tribunal for Lebanon, Explanatory Memorandum by the Tribunal's President [hereinafter June 2009 PRE Memo], http://www.stl-tsl.org/index.php?option=com_k2&view=item&task=download&id=340.

principle in Lebanon that those who legislate cannot adjudicate.⁶⁰ Once again one can say that the STL is not a Lebanese judicial body, but this patchy formula raises queries and confusion among Lebanese jurists when analysing such a combination.

The STL adopted the RPE on March 20, 2009, and announced them on March 24, 2009. Initially, Rules 134 and 152 regulated “contempt of the Tribunal” and “false testimony under Solemn Declaration”, respectively. The initial content of the two rules was copied *verbatim* from other ad hoc tribunals. On October 30, 2009, Rule 134 was amended by inserting two paragraphs; (i) and (vii):

(i) being a person who is questioned by or on behalf of a Party in circumstances not covered by Rule 152, knowingly and wilfully makes a statement which the person knows is false and which the person knows may be used as evidence in proceedings before the Tribunal, provided that the statement is accompanied by a formal acknowledgement by the person being questioned that he has been made aware about the potential criminal consequences of making a false statement;

...

(vii) Threatens, intimidates, engages in serious public defamation of, by statements that are untrue and the publication of which is inconsistent with freedom of expression as laid down in international human rights standards, offers a bribe to, or otherwise seeks to coerce, a Judge or any other officer of the Tribunal.⁶¹

The amendments included two cases of contempt that the RPE’s of other international courts had not explicitly stipulated. The first case of contempt is when a person gives a false statement at the investigation stage, regardless of if the tribunal may call him or her as a witness at the trial stage. Such prosecution can materialize subject to the following conditions: first, there is knowledge that the statement is false and the tribunal can use it as evidence; second, there is awareness of the potential criminal consequences; and third, there is an intention to interfere with the administration of justice. The STL adopted this innovation on false testimonies after the investigative process of the UNIIIC and the STL faced false witness testimony and attempts to infiltrate the investigation. This provision is “not applicable

⁶⁰ The principle of separation of powers is delineated in the Lebanese Constitution.

⁶¹ Rules of Procedure and Evidence as amended on 30 October 2009, Special Tribunal for Lebanon, Rule 134, STL/BD/2009/01/Rev. 2 (Oct. 30, 2009) [hereinafter PRE October 2009]. This rule is now codified under Rule 60 *bis* of the 10 November 2010 version of the PRE, STL/BD/2009/01/Rev. 3.

retrospectively, but *only prospectively*.”⁶² The statement leaves no doubt that the provision will not be applied prior to October 30, 2009. This seems like a lesson learned for the STL regarding difficulties faced by the investigation, but not an attempt by the STL to rectify problems that arose in the investigation before the UNIIC. This is unfortunate.

The second amendment was to Rule 134(A)(vii) in which the STL prohibits threatening, intimidating, or engaging in public defamation of a Judge or any other officer of the Tribunal through a false statement in violation of freedom of expression.⁶³ It also proscribes offering bribery to a judge or seeking to coerce him or her or any other officer of the Tribunal to coerce a judge or any other officer of the Tribunal.⁶⁴ This was probably added after a series of threats and intimidations that were publically raised by Lebanese political figures against some judges, the UNIIC, and the STL.⁶⁵ While this amendment is a welcome addition, it seems that the judges’ efforts remain reactive to particular situations. This reiterates the problem and challenges of ad hoc legislating that is often unable to comprehend all the variables and dynamics that may emerge in the process of doing justice. One can argue that this flexibility on amending the RPE is a point of strength rather than an element of weakness, yet this may come at the expense of the principle of legality and doing justice – or at least at the perception of doing justice.

A further subsequent amendment of contempt was adopted on November 10, 2010, and is of procedural than substantive nature. In this amendment Rule 134 was moved and incorporated in new Rule 60 *bis* under the title of Contempt and Obstruction of Justice. One added phrase of significance is the statement indicating that the Tribunal may hold persons in contempt “upon assertion of the Tribunal’s jurisdiction according to the Statute.”⁶⁶ This again seems to incorporate the non-retroactive application of the Rule before the entry into force of the Statute and the adoption of the

⁶² June 2009 PRE Memo, *supra* note 59.

⁶³ PRE October 2009, *supra* note 61, at Rule 134.

⁶⁴ Rules of Procedure and Evidence as of 10 November 2009, The Special Tribunal for Lebanon, Explanatory Memorandum by the Tribunal’s President [hereinafter November 2009 PRE Memo], http://www.stl-tsl.org/index.php?option=com_k2&view=item&task=download&id=337.

⁶⁵ *Hezbollah Chief Attacks STL for 3rd Time in 10 Days*, YALIBNAN, July 25, 2010, <http://www.yalibnan.com/2010/07/25/hezbollah-chief-attacks-stl-for-3rd-time-in-10-days/> (last visited on Mar. 15, 2011). *See also*, *Wahab launches another attack against STL*, YALIBNAN, Aug. 22, 2010, <http://www.yalibnan.com/2010/08/22/wahab-launches-another-attack-against-stl-2/> (last visited on Mar. 21, 2011).

⁶⁶ Rules of Procedure and Evidence as amended on 10 November 2010 and corrected on 29 November 2010, Special Tribunal for Lebanon, STL/BD/2009/01/Rev. 3, Rule 60 *bis* (Nov. 9, 2010).

RPE and its relevant amendments.

b. STL Jurisprudence

The *Case of Jamil El Sayed* is the first case adjudicated by the STL.⁶⁷ This case has tackled a number of contentious issues of relevance to this article. Whether before the Pre-Trial Judge or at the Appeal level, the deliberations and the judges' decisions have been of immense importance in unveiling a number of legal issues that remained ambiguous. Particularly relevant to this article are the issues of the relation of the UNIIC vis-à-vis the STL, false testimonies before the UNIIC and the STL, and the *locus standi* of individuals affected by the UNIIC's activities.

Lebanese authorities arrested El Sayed on August 29, 2005, based on a recommendation by the then Commissioner of the UNIIC Detlev Mehlis.⁶⁸ He was detained until March 2009 without charges. Article 108 of the Lebanese Code of Criminal Procedure tolerates detaining individuals without indictment for an indeterminate period of time for the suspicion of committing, *inter alia*, the crime of terrorism.⁶⁹ Throughout his detention, the UNIIC maintained the position that the jurisdiction regarding his detention since 2005 and until the deferral of the file to the STL was in the

⁶⁷ In the Matter of El Sayed, Case No. CWPTJ/2010/005, Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed has Standing Before the Tribunal, Pre-Trial Judge, Special Tribunal for Lebanon (*Sept. 17, 2010*).

⁶⁸ See Najjar, *supra* note 45.

⁶⁹ Article 108 stipulates that:

“With the exception of a person previously sentenced to at least one year's imprisonment, the period of detention for a misdemeanour may not exceed two months. This period may be extended by, at a maximum, a similar period where urgently necessary.

With the exception of homicide, felonies involving drugs and endangerment of state security, felonies entailing extreme danger and crimes of terrorism, and with the exception of persons with a previous criminal conviction, the period of custody may not exceed six months for a felony. This period of custody may be renewed once on the basis of a reasoned decision.

The Investigating Judge may decide to prevent the defendant from travelling for a period not exceeding two months for a misdemeanour and a year for a felony from the date of being released or left at liberty.”

Lebanese Code of Criminal Procedure, Act No. 328 of 7 Aug. 2001, as amended by Act No. 359 of 16 Aug. 2001, available at http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese_Code_Criminal_Procedure_EN.pdf (last visited Mar. 24, 2011).

hand of the Lebanese authorities.⁷⁰ On the other side, the Lebanese authorities were indicating that the arrest was based on the UNIIC's recommendation.⁷¹

As the STL was requesting the deferral of the file to the Tribunal, on April 10, 2009, it officially seized control over the Hariri case and those detained in relation with the case.⁷² On April 27, 2009 the STL Prosecutor after "reviewing all the documents that have been collected by the United Nations International Independent Investigation Commission . . ."⁷³ – as if this schizophrenic statement makes some sense knowing that the Prosecutor himself was the Commissioner of the UNIIC since November 2007 - requested the Pre-Trial Judge to release El Sayed and the three detained individuals in the case.⁷⁴ The STL called for these releases because of insufficiently credible information to support an indictment, inconsistencies in witnesses' statements, lack of corroborative evidence to support the witnesses' claims, and retraction of some witnesses from their previous statements.⁷⁵

Since then, El Sayed has not missed any opportunity to claim that his detention was based on false witnesses that the government fabricated to extend his detention for longer periods for political reasons. According to El Sayed, his pursuit of redress before Lebanese courts was futile, because the Lebanese judiciary indicated that it had no jurisdiction over the case.⁷⁶ On April 27, 2010, El Sayed approached the STL with a submission requesting the "evidentiary material related to the crime of libellous denunciation and arbitrary detention."⁷⁷

The landmark aspect of this case is that it raised the questions of whether the STL has jurisdiction over El Sayed's application and whether he

⁷⁰ Case No. CH/PTJ/2010/01, *Public Redacted Version of Memo Number 112 Application: Request for Release of Evidentiary Material Related to the crimes of Libellous Denunciations and Arbitrary Detention* (Mar. 17, 2010), published on Jan. 12, 2011.

⁷¹ See Najjar, *supra* note 45.

⁷² In the Matter of El Sayed, Case No. CH/PRES/2010/01, *Order Assigning Matter to Pre-Trial Judge*, President, Special Tribunal for Lebanon, 4 (April 15, 2010) [hereinafter *Order Assigning Matter to Pre-Trial Judge*], available at <http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/main/filings/orders-and-decisions/president-s-office/order-assigning-matter-to-pre-trial-judge> (last visited Aug. 21, 2011).

⁷³ *Jurisdiction and Standing Appeal Decision*, *supra* note 41, at 6.

⁷⁴ *Order Assigning Matter to Pretrial Judge*, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ See Decision of January 27, 2010 by Lebanese Judge Ghassan Munif Owiadat, *supra* note 43.

⁷⁷ Case No. CH/PTJ/2010/01, *Public Redacted Version of Memo Number 112 Application: Request for Release of Evidentiary Material Related to the crimes of Libellous Denunciations and Arbitrary Detention* (Mar. 17, 2010), published on Jan. 12, 2011.

had *locus standi* before the Tribunal.⁷⁸ The importance of these two questions is that they allow the STL to delve into the obscure nature of the relationship between the UNIIC and STL beyond Article 19 of the Statute. The applicant has been affected by the legal activity of the UNIIC – a Chapter VII investigative body with no prosecutorial mandate succeeded by an international(ised) tribunal that will practically build its prosecutions on the outcome of the UNIIC’s work – yet unable to rectify the misconducts in the administration of justice by *this sui generis* (para)legal body.

The applicant claimed that the UNIIC violated his rights from August 30, 2005, until April 7, 2009, as Lebanese authorities arbitrarily detained him with no access to his file based on the UNIIC’s recommendation.⁷⁹ However, the Prosecutor indicated that the Statute and the RPE do not vest the STL with jurisdiction to rule on the Application:

13. Article 1 of the Statute provides that the Tribunal’s jurisdiction is limited to adjudicating the criminal responsibility of individuals responsible for the attack against Rafiq Hariri and connected attacks. The crimes that can be charged in respect of those individuals are spelled out exhaustively in Article 2.

14. The Tribunal’s jurisdiction over the crimes referred to in Article 1 is grounded in the preamble of the Statute which expresses its object and purpose. It states that the Tribunal was established to “try all those who are found responsible for the terrorist crime which killed . . . Rafiq Hariri and others.” The Tribunal is a *criminal* court with a limited jurisdictional mandate. Simply put, this mandate is to bring terrorists to justice.⁸⁰

The Pre-trial judge in his Order resorted to the “inherent Jurisdiction”

⁷⁸ The President assigned the Application to the Pre-Trial Judge on April 15, 2010 to consider, *inter alia*, “whether the Tribunal has jurisdiction over the Application and whether the Applicant has standing before the Tribunal; . . .”. *Order Assigning Matter to Pre-Trial Judge, supra* note 72.

⁷⁹ Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed has Standing Before the Tribunal, *supra* note 67.

⁸⁰ In the Matter of El Sayed, Case. No. CH/PTJ/2010/01, *Prosecution’s Response with Annexes A and B to “Submissions on the jurisdiction of the Pre-Trial Judge to rule on the application dated 17 March 2010 and whether General Jamil El SAYED has standing before the Special Tribunal for Lebanon” Filed by Jamil El Sayed on 12 May 2010*, Pre-Trial Judge, Special Tribunal for Lebanon (June 2, 2010) 13, 14, *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/Prosecution/response_100602e.pdf (visited March 23, 2011).

of the Tribunal to justify jurisdiction over the application.⁸¹ He indicated that in conformity with other international courts, the STL “has implicit jurisdiction to rule on incidental issues that are connected to its mandate or have an impact on it and which must be settled in the interests of justice.”⁸² The application “is closely linked to [the Tribunal’s] original subject matter jurisdiction and must be settled in the interests of fairness of the proceedings and good administration of justice.”⁸³ He added that “even though the Applicant is not a ‘party’ to the proceedings as defined by the Tribunal’s Rules, the Applicant had been detained in connection with the Hariri case and under the legal authority of the Tribunal.”⁸⁴ Therefore, he indicated that the application is related to the case file of the Hariri assassination, concluding that the Tribunal has jurisdiction to rule on El Sayed Application.⁸⁵

The Appeal Chamber itself confirmed the Pre-Trial Judge’s position on November 10, 2010.⁸⁶ It indicated that the Pre-Trial judge rightly concluded that the Application was within the Tribunal’s “implicit” jurisdiction because the subject matter of the Application is closely linked to the original subject matter jurisdiction of the Tribunal, and for the interest of fairness of proceedings and the good administration of justice.⁸⁷ The Appeal Chamber defined the “inherent jurisdiction” of the Tribunal as “the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction.”⁸⁸ The Appeal Chamber added that inherent jurisdiction is “ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights.”⁸⁹

The Appeal Chamber followed the Pre-Trial Judge in widening the jurisdiction over El Sayd Application in circumvention of the limitations of

⁸¹ Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed has Standing Before the Tribunal, *supra* note 67.

⁸² *Id.* at 31.

⁸³ *Id.* at 32.

⁸⁴ *Id.* at 39.

⁸⁵ *Id.*

⁸⁶ PRESIDENT ANTONIO CASSESE, ANNUAL REPORT, SPECIAL TRIBUNAL FOR LEBANON 2010-2011 (Mar. 2011), http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/20110301_Annual%20Report_EN.pdf (last visited Feb. 27, 2011).

⁸⁷ *Jurisdiction and Standing Appeal Decision*, *supra* note 41, at 15.

⁸⁸ *Id.* at 45.

⁸⁹ *Id.* at 45.

the STL's primary jurisdiction by resorting to its inherent jurisdiction. However, it did not do so through explicitly elaborating on the legal relationship between the UNIIC's activities and the STL. Rather, it did so through Article 4, paragraph 2 and because the applicant, whose detention was based on a false testimony before the UNIIC, continued to be detained under the jurisdiction of the STL from April 10, 2009 until April 27, 2009.⁹⁰ Through this innovative approach the Appeal Chamber managed to extend the Tribunal's jurisdiction to grant a *locus standi* to an individual whose activity before the UNIIC led to his detention. Articles 19 of the Statute did not elaborate sufficiently on the complexities and the legal implications of the investigative process of the UNIIC vis-à-vis the judicial process of the STL and the rights of affected persons. Although the Pre-Trial Judge and the Appeal Chamber succeeded in relying on the inherent jurisdiction of the Tribunal to assert jurisdiction over the Application, it would have been more useful if the judges had delved into the legal relationship between the UNIIC's activities and the STL. This relationship is relevant not only regarding the probative value of the evidences collected, but rather to fill the lacunae of the legal implications of the UNIIC's activities before the creation of the STL, and the *locus standi* of individuals whose rights have been affected by the UNIIC's activities.

The respect for due process at the investigative level is as important as it is at the prosecutorial level, making it difficult for the public and even experts to bifurcate what had previously occurred before the UNIIC and the continuing investigative and prosecutorial efforts at the STL. This is especially the case because the UNIIC has practically merged into the OTP. It remains difficult to convince the affected society that the misconducts of breaching the confidentiality of the investigations and the rights of witnesses that the UNIIC's staff allegedly committed are immune from criminal liability, while those conducted by the OTP are within the ambit of RPE. This will be elaborated further *infra* when discussing the leaks of some confidential UNIIC interviews in the past years.

B. The Problem of Prosecuting Leaks of Confidential UNIIC Interviews and Investigations

On November 22, 2010, the Canadian broadcasting network CBC published a report on the Hariri investigation disclosing sensitive, but probably credible, information, including copies of internal UNIIC memoranda.⁹¹ In this report, the CBC correspondent unveiled confidential information about the STL's investigative work. The correspondent

⁹⁰ *Id.* at 53, 61.

⁹¹ Macdonald, *supra*, note 15.

indicated that this report had been the outcome of “[a] months-long CBC investigation, relying on interviews with multiple sources from inside the UN inquiry and some of the commission’s own records, found examples of timidity, bureaucratic inertia, and incompetence bordering on gross negligence.”⁹² Another previous report published by Der Spiegel preceded the CBC leak and disclosed confidential information “from sources close to the tribunal.”⁹³ Furthermore, in January 2011 a Lebanese local TV network broadcasted recordings of leaked confidential interviews conducted by UNIIIC investigators.⁹⁴ One of the interviewed victims indicated that the UNIIIC had requested the interview.⁹⁵

Although not identifying the possible leaker, the documents disclosed and the tapes aired all show that the breach was probably from within the Commission or the Tribunal. If so, then this is a setback to the credibility of the process and a violation of the confidentiality of the investigation, not to mention the repercussions of publishing such information on the protection of witnesses and victims. Moreover, the STL and United Nation’s timid comments,⁹⁶ if not to say complete silence on the matter, are surprising.⁹⁷ It is understandable that the Tribunal’s policy is not to comment on the progress of investigations. However the leak has caused considerable damage to the image of the STL, as these leaks reflected likely internal misconduct and violations of regulations and due process within the Commission and the STL. This requires immediate administrative and legislative measures that the public should know about to restore confidence in the Tribunal and the process of doing justice.

If one analyses such misconduct – provided that they were violations by the staff of the UNIIIC or the STL – then two tracks for accountability arise: the administrative track and the judicial one. On the latter, the UNIIIC was given the authority to conduct a criminal investigation, and thus any crime against the administration of justice within such a process must be

⁹² *Id.*

⁹³ Follath, *supra* note 15.

⁹⁴ *Leaked New TV report: Hariri told UN investigators Syria killed his father*, NOW LEBANON, Jan. 16, 2011, <http://www.nowlebanon.com/NewsArchiveDetails.aspx?ID=231202> (last visited Mar. 26, 2011).

⁹⁵ *Hariri’s Siddiq Conversation Came at Commission’s Request says PM’s office*, NOW LEBANON, Jan. 16, 2011, <http://www.nowlebanon.com/NewsArchiveDetails.aspx?ID=230972> (last visited Mar. 24, 2011).

⁹⁶ Hariri Prosecutor criticizes CBC reports, *CBC NEWS*, Nov. 23, 2010, <http://www.cbc.ca/news/world/story/2010/11/23/lebanon-hariri-reaction.html> (last visited Mar. 8, 2011).

⁹⁷ *UN tight-lipped on CBC probe into Hariri killing*, *CBC NEWS*, Nov. 22, 2010, <http://www.cbc.ca/news/world/story/2010/11/22/united-nations-hariri-reaction.html> (last visited Mar. 25, 2011).

prosecuted. This has been the practice in all international criminal tribunals whether through the Rules of Evidence and Procedure⁹⁸ or through the governing statute itself. However, a challenge arises as the UNIIC's mandate and authority preceded the STL's entry into force and is not currently part of the official investigation process of the OTP.⁹⁹ Does such a violation incur criminal liability for the UNIIC's staff? The answer seems complex and ambiguous. The RPE that was adopted on March 20, 2009, stipulates that:

Disclosure of Reports, Memoranda or Other Internal Documents
Reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules. For purposes of the Prosecutor, this includes reports, memoranda, or other internal documents prepared by the UNIIC or its assistants or representatives in connection with its investigative work.¹⁰⁰

The language of the Rule 111 refers to a "Party"; that is the Defence or the Prosecutor but not the Commissioner despite the reference to documents prepared by the UNIIC.¹⁰¹ Therefore the Rule restricts itself to the post-indictment stage where there are Parties to an adversarial process before the Tribunal. More precisely, Rule 111 targets the obligation of disclosure between the parties during proceedings, and its ambit does not cover leaking of information and documents to the media. The textual reading of Rule 111 relieves the parties from disclosing the above designated documents during proceedings— including the one transferred to the STL from UNIIC— but is not related to UNIIC's activities and documents revealed during the mandate of the Commission and prior to the post-indictment stages. This means that Rule 111 is not a useful tool for establishing criminal liability for the leaks discussed *supra* that probably took place before the STL's entry into force.¹⁰²

On the administrative level, the UNIIC's staff members are United Nations staff and are bound by the UN's confidentiality requirements.¹⁰³ A

⁹⁸ Rome Statute, *supra* note 57, at arts. 70, 71.

⁹⁹ The effects of Resolution 1595 ended with the establishment of the STL.

¹⁰⁰ Rules of Procedure and Evidence as adopted on 20 March 2009 and amended on 5 June 2009, Special Tribunal for Lebanon, Rule 111, STL/BD/2009/01/Rev. 1 (June 10, 2009).

¹⁰¹ According to Rule 2, a Party is the Prosecutor or the Defence. *Id.*

¹⁰² Most of interviews and documents disclosed were documents drafted during the mandate of the UNIIC, although news reports, such as the CBC, are newly published ones. See Macdonald, *supra*, note 15.

¹⁰³ Code of Ethics for United Nations Personnel, U.N. Doc. A/64/316, available at <http://www.unjustice.org/CodOE.pdf> (last visited Mar. 19, 2011).

violation of UN rules and regulations entails administrative measures that may lead to ending their contractual relation with the Organization.¹⁰⁴ Some of the UN staff enjoys immunity, but it can be lifted by the UN in cases of the commission of a crime against the hosting state pursuant to Convention on the Privileges and Immunities of the United Nations.¹⁰⁵ However, the dilemma lies with the question of whether disclosing UNIIIC documents or leaking UNIIIC confidential interviews constitute a crime under Lebanese

¹⁰⁴ Rule 10.2 of the UN Rules stipulates the following disciplinary measures that can be taken by the Secretary General:

“(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

- (i) Written or oral reprimand;
- (ii) Recovery of monies owed to the Organization;
- (iii) Administrative leave with or without pay pursuant to staff rule 10.4.”

See Staff Rules, Staff Regulations of the United Nations and Provisional Staff Rules, SECRETARY-GENERAL’S BULLETIN, U.N. Doc. ST/SGB/2009/7, Oct. 21, 2009, available at <http://www.un.org/esa/cdo/hr/RULES%20AND%20REGULATIONS/Staff%20Rules%20JY9.pdf> (last visited Mar. 28, 2011).

¹⁰⁵ Convention on the Privileges and Immunities of the United Nations §§ 20, 21, Feb. 13, 1946, 1 U.N.T.S. 15.

law. The answer is in the negative. What remains is for the UN to take administrative measures against the violating staff if it is proven that the individual committed such acts. However, even on that level no reported punitive measures have been disclosed to the public. It is important to the affected community to know that accountability for misconducts against the administration of justice is taking place. Again this will help in restoring a missing credibility and in reviving the notion that justice is being done and rule of law is prevailing. Administrative measures fall far short of criminal liability for such offences and are insufficient to do justice and create the perception that justice is being done.

On the STL level, conducts against the administration of justice can be prosecuted if committed after October 30, 2009. As mentioned earlier, the judges innovatively amended the RPEs to include conducts that were not proscribed under RPEs of other international tribunals.¹⁰⁶ These amendments are another contribution from the STL to a more consolidated international justice regime. However the other side of the coin is that these amendments are not retrospective and come only as a lesson learned from the structural gaps and loopholes of the *sui generis* investigative process of the UNIIC. Clearly, the drafters of Security Council Resolution 1595 and the Statute failed to deal with such “unforeseen” developments. The unfortunate aspect is that while the drafters of the Statute noticed some of these misconducts prior to the entry into force of the STL and its RPE, they did not attempt to bring them under the jurisdiction of the Tribunal, but rather filled the gap by proscribing such conduct after October 30, 2009. The argument that prosecuting prior acts offends the principle of legality may be misplaced. These acts – that are ancillary to the Hariri assassination – are already proscribed in Lebanese law,¹⁰⁷ and what the STL applied retrospectively over the crime of terrorism against Hariri can be applied *mutatis mutandi* to these conducts as well.

C. Apparent Structural flaws in Outreach and Situation Analysis

The STL, similar to other international courts, is well equipped with diversified legal and judicial expertise. Nonetheless, these international courts differ from national courts in that they function through the indirect enforcement model that depends on state cooperation and the support of the affected community. The STL, and previously the UNIIC, have a further feature in that they are one of the few international justice mechanisms that have been acting in an ongoing conflict situation.¹⁰⁸ Since 2005, Lebanon

¹⁰⁶ PRE October 2009, *supra* note 61, at Rule 134 A(i) and A(vii).

¹⁰⁷ Lebanese Penal Code, *supra* note 35, at art. 408.

¹⁰⁸ The ICC is currently looking into a number of ongoing conflict situations, such as

has been facing continuous, intense crises interrupted by a major war and a mini civil war.¹⁰⁹ The UNIIIC, and then the STL, have been functioning in a very insecure medium with serious threats to the judicial process. In such a situation, the challenge of in-depth assessment of the political and socio-political variables – in which the STL interacts and depends for cooperation – remains vital for doing justice and securing the trust of the public. However, the reaction of the STL to a number of these challenges that affected the international investigation remained below expectations. As mentioned earlier, the handling of the scandal of leaking of official UNIIIC documents was disappointing and passive.¹¹⁰ The STL gave no official comment on the disclosure of the tapes of investigations. No public information exists about any disciplinary measures taken against violators or perpetrators of such conducts. This has left a damaging scar on the image of the Tribunal as an impartial body aiming to seek truth and do justice.

The outreach efforts of the STL remain in need of more knowledge of the Lebanese context and its internal dynamics. STL Specialists and experts have conducted a number of activities on the STL's mandate and role, but they did not succeed yet in reaching the masses. Only a handful of elitist experts attended many of the activities that the Tribunal organised, but the present writer does not recall direct outreach to the ordinary people in Lebanon. The STL has remained at best on the reactive side of developments that immensely affected its work and level of cooperation with the Lebanese authorities. After more than five years of international investigation and two years of entry into force of the Tribunal, Lebanese opposition media networks succeeded in highlighting all the gaps and shortages highlighted above,¹¹¹ while the STL's response to accusations and alleged misconducts was at best passive.

Darfur, DRC, Libya, Northern Uganda and others... However this is relatively recent, and the experience of ad hoc and hybrid tribunals, such as the ICTY, ICTR, ECCC, SCSL, East Timor, and Bosnia, occurred mostly subsequent to the conflict.

¹⁰⁹ Lebanon witnessed a destructive war between Israel and Hezbollah in July 2006, while in May 2008 the confrontation between the pro-western March 14 alliance and the pro-Syrian and Iranian opposition culminated in a military confrontation where the opposition militarily took over the Capital. This ended temporarily by a Qatari sponsored Accord for sharing power between the two camps known as the "Doha Accord". This Accord collapsed in February 2011 by the resignation of the opposition ministers from the government over disagreements with the then majority on its stand over the STL and "false witnesses".

¹¹⁰ Except for expressing disappointment, the Prosecutor had no comments on that. *See Hariri Prosecutor criticizes CBC reports, supra* note 96. *See also UN tight-lipped on CBC probe into Hariri killing, supra* note 97.

¹¹¹ See Al Akhbar Newspaper that kept shedding light on the shortages and mistakes in the work of the STL. For more information, see Al Akhbar Newspaper, available online at: www.al-akhbar.com.

CONCLUSION

When the voices to end impunity for assassinations in Lebanon were raised, many of the Lebanese believed that their judicial system is either unable or unwilling to seek truth and end impunity. At that point, resort to the international community was the only viable option. Nonetheless, after six years of an international process, frustrations have replaced hope, and justice seekers started to implicitly question the mistakes and shortcomings of the process. Probably, most of these problems and misconducts preceded the establishment of the STL, but the affected public opinion looks at all that as one process. The STL's challenge remains to do justice and to be seen as doing justice.

The President of the Tribunal rightly indicated that the STL is faced with different challenges and different legal and political contexts than other international courts.¹¹² Such a distinct situation requires unique and particular solutions, and not ones copied from other ad hoc tribunals, which themselves were tailored for different situations, subject matters, and investigative processes.

In structure, the existence of an international independent commission succeeded by an international court is a new *sui generis* process that is not typical of any other international tribunal. Therefore, the judges of the STL should have taken these complexities into consideration when drafting the Rules of Procedure and Evidence, rather than merely copying most of them from other international tribunals.¹¹³ The transition from the UNIIC to the STL proved to be more complex than what Article 19 of the Statute envisaged.

The Statute's dichotomy from the investigative process of the UNIIC – except for Article 19 – is not a convincing *alibi* before the public regarding the non-activity toward misconducts against the administration of justice. The loopholes in the UNIIC's mandate could have been mitigated by amending the RPEs to cover such acts committed by false witnesses, staff, and other persons who proved to be in contempt of the court.

The incorporation of offences against the administration of justice in the Statute – similar to the ICC – would have been a more suitable and coherent option for the Lebanese context. Despite that, the RPE can still fill the gaps; although that will not be comfortably received by a civil law system such as Lebanon.

The jurisprudence of the STL based on the recent decisions of the Pre-Trial Judge of September 17, 2010, and the Appeal Chamber of November 10, 2010, seems to be more progressive in overcoming these problems.

¹¹² SPECIAL TRIBUNAL FOR LEBANON 2009-2010 ANNUAL REPORT, *supra* note 12.

¹¹³ June 2009 PRE Memo, *supra* note 59, at 1.

However, this has been through linking the applicant to the STL by his detention under the STL's jurisdiction from early April until April 27, 2009. It seems the judges remained careful to establish a firm dichotomy between the STL and the UNIIC's investigative activities. The near future will determine whether the jurisprudence of the STL can fill these gaps or whether it will continue rotating within the Statute and RPE's "donut-hole margin".

Although the STL's role as an institution to end impunity and help Lebanese reconcile with truth and accountability is not to be undermined, the hope remains that the outreach to the Lebanese and international public opinion is up to these expectations. Mistakes and accusations of maladministration of justice cannot be confronted only by silence. The public has the right to be informed about the truth of these misconducts and to be assured that violators and perpetrators have been held accountable.

The words of President Cassese, citing partially from Hegel, are wise in their context for the STL:

"The most harmful thing is that one should want to be safe from errors. The fear that in doing something one might make mistakes stems from love for comfort. This fear goes hand in hand with absolutely passive mistakes. The stone alone does not suffer from any active mistake."¹¹⁴ Certainly we must not shy away from "active errors" as long as we can move forward and fulfil our mission in the most fair and expeditious way possible.

¹¹⁵

These wise words accurately lead us in the right direction. However, by the same wisdom, if the STL is encouraged to "try and [then correct] errors" then it is called upon to correct the already existing errors hand in hand with continuously trying to achieve justice and accountability for all offences and misconducts . . . including its own.

¹¹⁴ W. Hegel, *Jena Aphorismen* (1801-06), in KARL ROSENKRANZ, GEORG WILHELM FRIEDRICH HEGEL'S LEBEN – SUPPLEMENT ZU HEGEL'S WERKEN (Berlin, Duncker und Humblot) (1844).

¹¹⁵ President Cassese citing Hegel in SPECIAL TRIBUNAL FOR LEBANON 2009-2010 ANNUAL REPORT, *supra* note 12, at 4.